91-2062

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Supreme Court, U.S.
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In the Supreme Court of the United States

1991-1992 Term

Charles E. Gavette

Petitioner

v.

Internal Revenue Service

Respondent

_____/

Petition for Writ of Certiorari

to the

United States Court of Appeals for the
Sixth Circuit

Lynn H. Shecter
Counsel of Record
for Petitioner
Roy, Shecter & Vocht, P.C.
877 South Adams, Suite 302
Birmingham, MI. 48009
(313) 540-7660

QUESTIONS PRESENTED FOR REVIEW

1. Did the IRS' violation of a statute designed to protect handicapped persons absent on workers' disability compensation constitute evidence of discrimination on the basis of handicap?

2. Did the ruling of the Sixth Circuit conflict with the Rehabilitation Act when it placed the burden of complying with federal regulations mandating promotional opportunity on handicapped workers instead of on the employer, the federal government?

3. Did the Respondent's ouster of Petitioner, by an invalid involuntary disability retirement, preclude Petitioner from

receiving notice of promotional opportunities afforded similarly situated employees who were not involuntarily retired?

There is no parent or subsidiary corporation to be listed in this case.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THE CASE

Decision of the United States District Court for the Eastern District of Michigan

Decision of the Merit Systems Protection Board

Decision of the United States Court of Appeals for the Sixth Circuit

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction is based on The Rehabilitation Act, 29 U.S.C. 701, et. seq.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The applicable statutory provision 5 U.S.C. 8151, states in pertinent part:

> "(a) In the event the individual renews employment with the Federal Government, the entire time during which the employee was receiving compensation under

this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based on length of service.

"(b) Under regulations issued by the Civil Service Commission:

(11) The department or agency which was the employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of compensation....[t]he first to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, [and] promotion....(emphasis added.)

"(2) The department or agency which was the employer shall, if the injury or disability is overcome within a period of more than 1 year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing the employee in his former or equivalent position within such department or agency, or within any other department or agency."

("b) Under regulations issued by the Office of Personnel Management -

"(1) The department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation...the right to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the right to tenure [and] promotion...."

The Federal Personnel Manual provisions in effect during the required time period provide:

"Agencies are required to safeguard the rights of employees who are absent because of compensable injury or military duty, whether the employees have been separated, furloughed, or placed on leave of absence. To this end, agencies must take the actions specified in this subchapter, as appropriate, and maintain the records necessary to assure that the rights granted these employees by law and regulation are preserved." **F.P.M. Sub chapter 3-1.**

"When employees sustain a compensable injury....the agency must tell them....about.... restoration rights, how to exercise them, the time limit, and how, where, and when to appeal to obtain those rights. Employees going on leave of absence must know exactly when to report for work after recovering from injury....On

things employees must decide for themselves, they should have all the information necessary to make a good decisions, for example, decisions on what to do about rights under the life insurance and health benefit programs, right to be paid for annual leave or to permit it to remain to their credit until returning, and the right to leave their retirement deductions or to take a refund." **F.P.M. Appendix A-1(e).**

"If any employee has recovered within one year after the date of compensation begins...the employee is entitled to resume his or her former or an equivalent position." **F.P.M. Subchapter 2-6(A)(1).**

"Note: The 1-year period referred to in this section means 1 year from the date compensation would ordinarily begin. For example, if the employee full recovers, but the Department of Labor has still not determined if the claim is compensable, the agency should generally accord the employee the rights specified herein pending the Department's determination." **F.P.M. Subchapter 2-6(a)(4).**[emphasis added]

"Of an employee's recovery takes longer than one year from the date compensation begins, the last employing agency must make all reasonable efforts to place, and must accord priority to placing the employee in his her former or an equivalent position...." **F.P.M. Subchapter 2-6(a)(3).**

"**Restoration right is agency wide.** The responsibility for restoring an employee rests on the agency, not just the installation the employee left because of compensable injury or military duty. An employee must be restored if there is an appropriate position anywhere in the agency." **F.P.M. Subchapter 4-2(b).**

"An agency must consider absent employees for every promotion they would be considered for if they were present." **F.P.M. Subchapter 3-2(a).**

"Each promotion made under this section, is to be effected on the day it would be effected if the employee were present." **F.P.M. Subchapter 3-2(b).**

29 C.F.R. 1613.704 required, during the relevant period:

"(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

"(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of

examinations, the provision of readers and interpreters, and other similar actions.

I.) STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit, from a decision filed December 13, 1991. The Court of Appeals denied the appeal of Petitioner, Charles E. Gavette, from a grant of summary judgment to Respondent, Internal Revenue Service [IRS]. Summary judgment was granted by the United States District Court of the Eastern District of Michigan.

Petitioner, an IRS employee, filed a complaint alleging, inter alia, handicap discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 in the District Court, following the EEOC cancellation of his claims of handicap and age discrimination. This petition is based on

the denial below of his handicap discrimination claims.[1]

Petitioner was awarded worker's disability compensation for two distinct periods of time, August 3, 1979, to May 7, 1982; and January 25, 1985, to January 8, 1986. As a result of the IRS' failure to notify him of his re-employment rights, promotion rights, and other benefits, and to enable him to obtain those rights and benefits, pursuant to 5 U.S.C. Sec. 8151, and F.P.M. 353, Petitioner filed two EEOC complaints alleging handicap and age discrimination. When

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[1] Petitioner filed a claim with the Merit Systems Protection Board [MSPB]. The MSPB found that IRS violated his rights to notice of promotion and to promotion, and ordered IRS to treat him as if he had been present for purposes of promotion. IRS filed a certificate of compliance, contending that since Petitioner failed to file an interest card, he could not be considered for promotion. Petitioner did not challenge the IRS certification, but continued to pursue his handicap discrimination case, which was already pending in District Court. This is not an appeal from the MSPB decision.

the EEOC canceled his claims, he filed the instant action. This petition is based on dismissal of his handicap discrimination claim, only.

In addition, Petitioner appealed the IRS's refusal to give him re-employment and promotion rights, pursuant to 5 U.S.C. 8151 and Federal Personnel Manual 353 to the Merit System Protection Board (MSPB). The MSPB held that IRS violated these regulations when it and failed to give Petitioner his re-employment and promotion rights. App.at 29.

The District Court dismissed the lawsuit on December 19, 1990, finding, inter alia. that there was no record of handicap discrimination in the case. App. at p. Petitioner appealed the District Court's denial of his handicap discrimination claim to the Court of Appeals for the Sixth Circuit.

The Court of Appeals, App at 38, held that Petitioner

did not satisfy his burden to respond to Respondent's motion for summary judgment. The appeals court noted that Petitioner pointed to some evidence he claimed demonstrated that he was the victim of disparate treatment[2], because he did not receive notifications afforded able-bodied employees. The Court found, however, that was not the theory on which

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[2] Petitioner argued that the IRS requires employees to fill out a Form 4536, or interest card, in order to be considered for promotions. Petitioner never filled out an interest card because he never knew he was entitled to promotion and further, did not know what positions were available. Following the MSPB decision that it violated 5 U.S.C. 8151 and F.P.M. 353, the IRS relied on GAVETTE's failure to file an interest card to justify failing to promote him.
However, all Merit Placement Announcements issued by the IRS require, "Managers should ensure that eligible employees under their supervision are informed in sufficient time to apply (or file Form 4536 for their employees)." This affirmative duty imposed on managers for employees who are not absent because of worker's compensation-related handicaps, contrasts with the IRS' failure to even notify absent handicapped employees of their rights and of openings, and therefore constitutes evidence of disparate treatment.

Petitioner proceeded in the District Court. [3] The Court

[3] This was not accurate. Petitioner advanced a theory that the policy of not notifying injured workers of their rights had a disparate impact on injured workers. All able-bodied workers had to do was read the bulletin board while at work to be apprised of promotional opportunities.

Petitioner claimed the policy practiced by IRS caused him to be treated differently from able-bodied workers in two respects.

1. By not telling him he was eligible for promotions while on sick leave, Petitioner was induced not to act.

2. An injured or sick worker is not on the premises to read the bulletin board. The worker is at home or at a hospital recuperating. In Petitioner's case, he was classified as involuntarily retired -- he was not an active employee of IRS and had no right to even enter the premises. Therefore, the bulletin board relied on in the Court of Appeals' decision was not relevant because it was not accessible to him.

The policy and the resulting disparate impact on handicapped persons violated the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq, the handicap discrimination statute on which this case was brought.

proceeded to review other evidence of disparate treatment. Petitioner contended, based on the deposition testimony of Sharon Hays, a personnel staffing specialist designated by the IRS, that the IRS never personally notified individuals who were absent from work on workers' compensation of promotional opportunities.[4] At oral argument, IRS admitted posting job openings and promotion opportunities on a bulletin board at the workplace. The Court found that Petitioner should have checked these posted notices or should have called the office of personnel development for information.

The Court of Appeals did not consider Petitioner's

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[4] Hays testified that if they were to be notified, she was the person who would notify them, and that she did not do so. App. at _

theory that IRS' failure to follow notification requirements was evidence of discrimination.

II. STATEMENT OF FACTS

When Petitioner recovered from his second compensable illness, Petitioner requested his re-employment rights. App. at . IRS denied the request, claiming Petitioner was retired prior to the date of his illness. Therefore, he was not qualified for the immediate and unconditional re-employment rights of an employee who recovers from a compensable illness within one year. App. at

On September 16, 1987, the U.S. Department of Labor awarded him total disability compensation for the period of January 25, 1985, through January 8, 1986. App. at . On October 13, 1987, Petitioner again requested re-employment. App. at .

On March 11, 1988, he filed an administrative

complaint with the Equal Employment Opportunity Commision [EEOC], Agency No. 88-1082. The complaint concerned IRS' failure to inform Petitioner of his reinstatement rights, and IRS' refusal to reinstate Petitioner to make a final decision and to give Petitioner his appeal rights. App. at

The IRS responded on March 30, 1988, to the October 13, 1987, letter, App. at , and denied Petitioner's re-employment request. The IRS claimed the restoration rights of 5 U.S.C. 8151 did not apply because the compensable conditions arose after his alleged retirement. App. at .

The IRS' March 30, 1988 letter was inaccurate. Petitioner's illness commenced January 25, 1985, and he was employed by IRS at least through February 1, 1985. App. at . The Court of Appeals reversed the earlier involuntary retirement. See also, June 1, 1988, settlement of Civil Action

84 CV-4109-DT, which restored Petitioner to work, but preserved his right to pursue any rights he had to promotions under 5 U.S.C. 8151, including employment discrimination claims. App. at .

On May 10, 1988, Petitioner filed a second administrative EEOC complaint, Agency No. 88-1099. App. at . As a result of a Freedom of Information Act request, Petitioner learned IRS failed to inform him he was entitled to be considered for promotion during the first year of his absence from work. This failure occurred during his two separate work-related illnesses, commencing in 1979 and 1985. He also learned IRS failed to consider him for promotion.

On May 13, 1988 IRS declined to process the first EEO complaint, No. 88-1082. IRS contended that, since it had denied Petitioner's request for reinstatement on March 30, 1985, he was no longer an aggrieved individual. IRS, by

letter dated June 14, 1988, App. at ., terminated the second EEO Complaint, No. 1099.

Petitioner appealed the two EEO Complaints to the EEOC on June 21, 1988 and July 6, 1988. The EEOC denied them on August 30, 1988 and September 1, 1988, respectively.

Petitioner petitioned the EEOC for review on September 28, 1988. On March 4 and March 6, 1989, Petitioner received the EEOC final decisions which again supported the IRS. On April 3, 1989, Petitioner timely appealed EEOC's final decisions.

For Petitioner's illness of August 3, 1979, to May 7, 1982, IRS failed to notify him of promotions during the first year of his absence, and failed to notify him of, and to consider him for, immediate and unconditional employment rights and of priority re-employment rights. Petitioner was re-employable as early as May 7, 1982, after the first illness.

IRS again failed to notify Petitioner of, and to consider him for, promotions during his second illness-related absence, January 25, 1985 to January 8, 1986. IRS also failed to notify him of or to consider Petitioner for immediate and unconditional employment rights, or of priority re-employment rights.

IRS admits it did not give Petitioner any promotion rights, pursuant to an internal policy. Under this IRS policy, persons absent on workers' disability compensation are not advised they are eligible for promotion and are not told about positions for which they are eligible to be promoted. App. at . This policy violates 5 USC 8151 and FPM 33.[5]

In addition to this policy, IRS also treats employees

[5] One issue raised in this Petition is that these violations constitute evidence of discrimination in determining liability under The Rehabilitation Act, 29 USC 701.

who are absent because of worker's compensation-related disablity differently from those absent for other purposes. IRS requires all employees to fill out interest cards before they can be considered for promotion. IRS policy requires managers to assist employees absent for other reasons to fill out these cards, but do not do so for those on workers' compensation. Petitioner claims this constitute's handicap discrimination.

1.) **IRS Violation of Federal Policy Constitutes Evidence of Discrimination and the Court's Failure To Consider This Evidence Was Error**

Petitioner presented three indices of discrimination to the Court of Appeals:

> (1) the violation of 5 C.F.R. Sect. 353.307 and the refusal to notify injured workers of their reemployment and promotion rights;
>
> (2) the violation of 5 C.F.R. Sect. 353.201(a) and the failure to provide a mechanism to consider injured workers for promotion, and

(3) maintaining a differential policy concerning interest cards.

The policy of failing to inform and to promote injured workers violates 5 C.F.R. Sect. 353.201(a):

> "Agency promotion plans must provide a mechanism by which employees who are absent because of compensable injury or military duty can be considered for promotion."

It is undisputed that IRS does not do this.

5 C.F.R. 353.307 entitles an employee whose recovery takes longer than one year to priority consideration for restoration to the position, if an application for reappointment is made within 30 days after worker's disability compensation ceases. The application requirement is waived where the agency fails to advise the employee "of his rights, obligations, and benefits relating to his government employment." 5 C.F.R. 353.106.

This applies to the IRS interest card requirement, in

view of the agency's failure to advise Petitioner "of his rights, obligations, and benefits relating to his government reemployment." While the IRS requires employees to learn IRS policies, this must be viewed in the context of the requirement to advise employees of their rights and benefits. The IRS argument can be reconciled with the requirement to advise employees, only in the context of policies which comply with the law. The IRS cannot, as it does with handicapped persons, design policies which affirmatively conceal their rights from them, and then abdicate its responsibility to give these same handicapped persons the benefit of policies which were designed to help them, because they did not know about them.

IRS notifies all other absent persons about promotion rights and promotion opportunities. Its policies provide for management and supervision to fill out forms and interest

cards for these absent employees. IRS does not do the same for persons who are absent because of workers' compensation-related injuries.

IRS maintains that it does not discriminate against absent handicapped workers, because all employees must fill out interest cards prior to promotion. However, in light of the fact that it does not advise all employees that they have promotion rights, and that IRS policy provides for supervisors to fill out interest cards for employees absent for reasons other than work-related disabilities, IRS policy discriminates against absent handicapped workers. If the agency fails to notify a person of the opportunity to be promoted, it is irrelevant what else it does, because the person is not going to file an interest card and apply for positions he or she does not know about, and which he or she does not know they are

entitled to apply for.[6] However, IRS compounds this by ensuring that other absent employees send in interest cards, even if their supervisors fill out and send in their cards for them.

IRS further argues that it does not discriminate on the basis of handicap because it tells no one that injured workers have re-employment and promotion rights. This argument is specious. The requirement that injured workers be considered for promotion as if they were present does not apply to anyone except injured workers. Nothing would be

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[6] Petitioner advised the Court that he was never informed of promotional opportunities while off the job on a workers compensation related condition. He had no reason to check bulletin boards because he was never told he was eligible to be promoted in the first place. He further stated that he filed interest cards when he became aware of opportunities and the only reason that he did not file cards during the period of his disability was that he was not informed of his promotional rights or of job openings.

gained by telling non-injured workers about these rights. Therefore, IRS can not claim it does not discriminate because it tells no one about the requirement to promoted injured workers as if they were present.

IRS' argument, however, misses the point. Whether it treats everyone the same by not telling anyone of handicapped workers' rights, and even whether it does not follow its own policy of requirirng supervisors and managers to fill out interest cards for other absent workers, has nothing to do with the fact that it violates the regulations requiring it to give handicapped workers these rights.

What the lower courts failed to acknowledge is that where an agency of the United States government violates a regulation designed to protect a protected class, that violation is itself evidence of discrimination. The lower courts erred in refusing to consider the finding by the MSPB that the IRS

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violated the mandates of the F.P.M. and the requisite federal statutes.[7]

The MSPB found the IRS violated a rule specifically designed to assist handicapped workers.

[8] MSPB findings on an employment discrimination claim are admissible as evidence in a later trial de novo. Rana v. United States, 812 F 2d 887, 43 FEP cases 161, 162 (4th Cir.

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[7] This is different from a finding of failure on the part of an employer to follow its own regulations and procedures, which alone, may not be sufficient to support a finding of discrimination. Johnson v. Lehman, 28 FEP Cases 1485, 1488 (D.C. Cir. 1982).

[8] This contrasts with McIntosh v. Weinberger, 810 F. 2d 45 FEP Cases 398, 410 (8th Cir. 1987) where the agency's di of OPM regulations was not directed against the cases to plaintiffs belonged, but were rather general and per affecting all applicants, regardless of their race or n origin. The Court held that because of the general impact applicants, the failure to follow guidelines did not amo intentional discrimination.

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1987), citing, cf., Chandler v. Roudebush, 425 U.S. 840, 863 n.39, 12 FEP Case 1368 (1976).[9]

The evidentiary function of violation of another statute designed to protect a class also protected under an antidiscrimination act was demonstrated in Whitlock v. Donovan, 598 F.Supp 126, 36 FEP Cases 475 (D.C. 1984). Whitlock involved the relationship between the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 and the Rehabilitation Act of 1973.

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[9] Plaintiff in Rana asked the court for relief from the statutorily prescribed procedure which permitted the court conducting a denovo trial of a discrimination claim, to review the finding of the MSPB. The court, rejecting this argument, quoted Justice Hughes: "Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system." Sorrells v. United States, 287 U.S. 435, 350 (1932). Rana, supra, 43 FEP Cases at 162-63.

The Whitlock Court held that alcoholism is included for purposes of the handicap discrimination protection of the Rehabilitation Act of 1973. Under Section 501 of the Act, federal agency employers such as the Department of Labor [and the IRS] have a duty of affirmative action toward handicapped employees and applicants. Section 501 was intended to make the federal government a 'leader' or 'model employer' of the handicapped. The Court held that this requirement is more than a requirement of non-discrimination or even-handed treatment.[10] Whitlock, supra, 36 FED Cases

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[10] 29 C.F.R. Sect. 1613.704 required, during the relevant period:

> "(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

"(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions."

In the case at bar, the accommodation sought was less expensive and less burdensome than accommodations suggested in (b). For example, when persons are absent on worker's disability compensation, they are mailed information concerning their worker's disability compensation rights. How burdensome would it be if in the same mailing, these people were notified of their rights to re-employment and to promotion? Once an employee received this notice, it would not be unreasonable to require that interest cards be filled out, indicating the geographical areas and type of employment which would be acceptable. Pursuant to the IRS policy requiring supervisors to fill out interest cards for employees absent for reasons other than worker's disability compensation-related handicaps, the last supervisor could fill out the interest cards of these employees as well. The IRS would then be required to mail notices of promotions pursuant to these interest cards only. This is a far different procedure from requiring employees to fill out interest cards when they do not even know they are eligible for promotion, and have no way of learning the available positions.

at 428.

The Court viewed the Rehabilitation Act in concert with the requirements of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970.

> "These statutes viewed together in the light of their legislative history show Congress's firm intention to require federal employers to exert substantial affirmative efforts to assist alcoholic employees toward overcoming their handicap before firing them for performance deficiencies related to drinking. It is this duty, which is subsumed under the 'reasonable accommodation' requirement of Section 501(b) of the Rehabilitation Act and the regulations 29 C.F.R. Sect. 1613.704, that plaintiff has invoked." Whitlock, supra, 36 FEP Cases at 428.

The court then reviewed publications issued by the U.S. Office of Personnel Management [OPM], including the Federal Personnel Manual [FPM], to consider procedures

which the agency was required to pursue in order to satisfy its duty to accommodate under the Rehabilitation Act. Whitlock, supra, 36 FEP Cases at 428-30. Based on this review, as applied to the history of plaintiff at the Department of Labor, the Court found that the Department of Labor failed to follow the procedures established by OPM.[11] This demonstrated a failure to accommodate plaintiff, and since the agency failed to show that it could not accommodate without undue hardship, the court found that the agency violated its duty to the handicapped employee. Whitlock, supra, 36 FEP Cases at 433.

Relevant to the case at bar, is that the Whitlock

[11] For example, the regulations require an agency to evaluate all available evidence in deciding whether a disease is responsible for an employee's unacceptable performance. This the agency did not do. Whitlock, supra, 36 FEP Cases at 433.

Court, unlike the courts reviewing petitioner's claim, did not ignore the evidence of violation of federal regulations by the agency, but instead used these violations to demonstrate a failure to accommodate plaintiff's handicap.

This principle applies to violations of merit selection procedures as well.

> "[W]hen the federal government is involved, deviation from legally mandated civil service procedures and requirements cannot form the basis of a legitimate, lawful explanation sufficient to overcome a prima facie case of discrimination. Unlike a private employer, a federal agency is simply not free to run its employment practices in any way it sees fit. Congress and the Civil Service Commission (now the Office of Personnel Management) mandate by law and regulation procedures and practices whose purpose is to result in selection based on true merit. Serious and substantial deviations from these procedures...cannot be used to justify the non-selection of a qualified [individual]. Indeed, such deviations are themselves indicia of discrimination that serve to rebut Defendant's proffered 'legitimate and non-discriminatory' reasons." Hogan v. Pierce, 31 FEP Cases 115, 126 (DC 1983).

The courts below erred in not considering the IRS' serious and substantial deviations from procedures mandated by the F.P.M. and by statute as indicia of discrimination in the case at bar. Separate and apart from evidence of disparate treatment in the filing of interest cards, the courts committed error in ignoring the uncontested fact that the IRS violated the very regulations designed to protect the class to which petitioner belonged, that of handicapped workers absent because of worker's disability compensation.

Had the reviewing courts given these violations appropriate evidentiary weight, they could not have found that Petitioner failed to produce evidence of discrimination.

By rejecting the evidentiary significance of violations of statutes and federal regulations designed for the benefit of the same protected class, the decisions of the courts below constitute a departure from the accepted and ususal course of

judicial proceedings, warranting the exercise of this Court's power of supervision.

2} The ruling of the Sixth Circuit conflicted with the Rehabilitation Act when it placed the burden of complying with Federal regulations mandating promotional opportunity on handicapped workers instead of on the employer, the Federal government.

Section 501 of the Rehabilitation Act required federal employers to undertake affirmative action on behalf of the handicapped. The Sixth Circuit Court of Appeals has held that this affirmative obligation goes beyond thaqt set out in section 504, which, by its terms, requires only non-discrimination. Hall v U.S. Postal Service, 857 F.2d 1073, 47 FEP Cases 1540, 1543 (6th Cir. 1988).

Other circuits have similarly held. In Reyon v. FDIC, 565 F.2d 762, 763, 15 FEP cases 1043 (D.C. Cir. 1977) the Court stated,

"...[S]ection 501 "imposes a duty upon federal

> agencies to structure their procedures and programs so as to ensure that the handicapped individuals are afforded equal opportunity in both job assignment and promotion."
> See also, Rewitt v. United States Postal Service, 662 F.2d 292, 306 (5th Cir. 1981; Mantolete v. Bolger, 767 F.2d 1416, 1421, 38 FEP Cases 1081 (9th Cir. 1985); Hall v. US Postal Service, 857 F.2d 1073 (6th Cir. 1988)."

The EEOC, the agency charged with enforcement of the Act has promulgated regulations which declare that "the Federal Government shall become a model employer of handicapped individuals". 29 C.F.R. 1613.703 (1987).

The regulations require an agency to make a reasonable accommodation unless it can demonstrate that the accommodation would inmpoose an undue hardship on the operation of its program. 29 C.F.R. 1613.703. The Court of Appeals erred by failing to impose this requirement on the IRS.

Instead, the Sixth Circuit Court of Appeals placed the

affirmative duty of checking the bulletin board for promotional opportunities on the employee. When the Court of Appeals held the IRS had to do nothing more than its usual policy of posting openings, it failed to find that any other accommodation, such as mailing notices, would constitute a burden on the agency.

IRS policy does not affirmatively ensure that handicapped individuals on workers compensation leave are apprised of their right to compete for promotions, or of promotional opportunities. This policy, applied across the board to all workers compensation recipients does not afford them the same opportunities as non-injured workers. IRS has fallen short of the EEOC "model employee" mandate, by failing to take several steps to comply, IRS merely had to:

a. Develop a form detailing the injured workers' rights and give it to the worker when the worker was approved for or workers

compensation.

b. Mail a copy of the job postings to the injured workers.

Given the highly computerized operation of IRS, such a program would be relatively simple and easy to implement and administer.

The ruling of the Sixth Circuit Court of Appeals conflicts with the Rehabilitation Act, prior rulings of other circuit courts, prior rulings of the 6th Circuit, and administrative regulations.

3.) **The Respondent's ouster of Petitioner, by an invalid involuntary disability retirement, precluded Petitioner from receiving notice of promotional opportunities afforded similarly situated employees who were not involuntarily retired.**

The record establishes that notices of promotional opportunities were posted on a bulletin board at the

workplace. There is no question that Petitioner's involuntary disability retirement terminated his access as an employee to the workplace. Unlike his able-bodied co-workers who could periodically and freely check for posted notices on site, Petitioner was no longer on site.

The Court of Appeals overlooked completely the fact that the invalid involuntary retirement, itself, constituted an ouster of Petitioner from free access to the same information provided to employees who were not involuntarily retired on the basis of disability. That was differential treatment.

Even where employees are, at minimum, on site the diminishment of their ability to see postings put in other departments is held to be evidence of discriminatory misconduct. e.g., Wells v. Meyers Bakers, 561 F.2d 1268, 15 FEP Cases 930, 932 (8th Cir. 1977). In Wells, supra at 932, the employer's placement practices diminished black

employee promotional opportunities by shutting off access to postings:

> "Vacancies in PSS were posted in the employees' lounge, but vacancies in maintenance and transportation were posted only within the respective department areas, which were generally off limits to PSS employees. This system greatly diminished the opportunity of a black employee with seniority assigned to PSS to bid on a vacancy in another department."

What more of a lock-out or off-limit diminishment to Petitioner's right to equal access to postings could there be than a complete ouster from the workplace, itself, by involuntarily retirement? By the very act of involuntary retirement, Petitioner was denied equal opportunity to see promotional opportunities that able-bodied workers at work were free to see. By greater opportunity of access, able-bodied workers had, as well, greater opportunity to take expeditious action.

The key to the lack of notice of promotional opportunity claimed by Petitioner is lack of equal access to promotional opportunity postings. The Court of Appeal's finding that Petitioner "failed periodically to check the posted notices" presumes that Petitioner was at work and had free access to perform that simple function. That presumption coupled with the Court of Appeal's failure to consider the unequivocal fact that Petitioner was involuntarily absent from the work site is reversible error.

CONCLUSION

Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

ROY, SHECTER & VOCHT, P.C.

Lynn H. Shecter (P24845)
Counsel of Record
for Petitioner
877 S. Adams, Ste. 302
Birmingham, MI 48009
(313) 540-7660

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